IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-119

JAMES DAY HODGSON, Secretary of Labor,
Plaintiff-Respondent
and
MIKE TRBOVICH (Proposed Intervenor), *Petitioner*
v.
UNITED MINE WORKERS OF AMERICA,
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AUTHORITIES CITED

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OPINIONS BELOW

The decision of the District Court is published as *Hodgson* v. *United Mine Workers of America,* 51 F.R.D. 270 (1970), and is appended to this petition. The Court of Appeals affirmed without opinion. Its judgment is published at 77 LRRM 2496 and is appended to this petition.

JURISDICTION

The Court of Appeals affirmed denial of petitioner's motion for leave to intervene by order of April 27, 1971. This petition is timely filed under 28 U.S.C. 2101(c). Jurisdiction is conferred by 28 U.S.C. 1254(1).

ISSUE PRESENTED

Whether a member of a labor organization who concededly satisfies all conditions for intervention of right under Rule 24(a), FRCP, is entitled to intervene, on behalf of himself and other members desiring a new election of union officers, in a civil suit brought by the Secretary of Labor under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401, *et seq.* (hereinafter "LMRDA"), to set aside a union election.

STATUTORY SCHEME

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 401, *et seq.,* also known as the Landrum-Griffin Act. In enacting this legislation Congress intended, above all else, to assure that labor unions would be governed democratically, that union officers would be selected in fair and honest elections, and that all union members would have a full opportunity to participate in the election process.

The provisions relevant to this case are Title IV of LMRDA, sections 401, *et seq.,* 29 U.S.C. 481, *et seq.,* and Rule 24 of the Federal Rules of Civil Procedure (FRCP). The LMRDA provisions can best be described and appreciated in connection with the particular union election from which this case arises. The December 9, 1969 election of International Officers of the United

Mine Workers of America, one of the bitterest internal union struggles in the history of the country, put these provisions of the LMRDA and their administration by the Department of Labor to their most severe test. As described below, the election was marred by countless violations of the Union's constitution and federal law and ultimately by the murder of candidate Joseph A. ("Jock") Yablonski, his wife and daughter during the month immediately following the election. Despite repeated communications from Yablonski's lawyers detailing hundreds of pre-election violations of LMRDA, the Labor Department declined even to initiate an investigation during the pre-election period. Following petitioner's post-election complaint, the Secretary of Labor brought suit to upset the election. His suit, however, as we show, fails to raise some of the most serious violations and to seek remedial relief which would be effective in preventing repetition of the violations alleged.

During the months following initiation of the present suit, a group of miners organized Miners for Democracy, a reform party within UMWA, seeking fair and honest elections at all levels of the Union and strict enforcement of LMRDA. Petitioner, who was Yablonski's campaign manager, was elected national chairman. For reasons fully stated below, petitioner found it necessary to seek leave to intervene in this proceeding in order to protect his interest in assuring that any rerun election, and all future UMW elections, will be genuinely fair and honest.

The statutory requirements for union election procedures are set forth in Section 401. Section 401(a) requires that a national or international labor organization elect officers at least once every five years. The

election must be by secret ballot among members in good standing or at a convention of delegates chosen by secret ballot. Section 401(e) imposes certain duties on labor organizations and their officers, enforceable at the suit of any bona fide candidate for office: (1) to comply with reasonable requests of any candidate to distribute campaign literature at the candidate's expense to all members; (2) not to discriminate regarding use of membership lists; and (3) if use of union funds is authorized for distribution of campaign literature of any candidate, or of the labor organization itself with reference to such election, to comply with the request of any other bona fide candidate for equal treatment. Further, Section 401(c) guarantees every bona fide candidate the right, once within the 30 days prior to an election, to inspect a list containing the names and last known addresses of all members who are subject to a collective bargaining agreement requiring membership as a condition of employment; such a list must be kept at the principal office of the labor organization. Finally, Section 401(c) provides:

> "Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots."

Section 401(e) directs that a "reasonable opportunity shall be given for the nomination of candidates"; that, subject to reasonable qualifications uniformly imposed and subject to the disqualifications of Section 504 (not relevant here), "every member in good standing shall be eligible to be a candidate and to hold office"; and that every member in good standing shall have the "right to vote for or otherwise support the candidate or candidates of his choice, without being subject to

penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof." Further, Section 401(e) directs that at least 15 days prior to an election, notice shall be mailed to each member at his last known address and that each member is entitled to one vote.

Section 401(e) also requires that the votes cast by members of each local organization be counted, and the results published separately. Finally, Section 401(e) directs that elections "be conducted in accordance with the constitution and bylaws of [the] organization insofar as they are not inconsistent [with Title IV.]"

Regarding use of union funds, Section 401(g) directs:

> "No moneys received by any labor organization by way of dues, assessments, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title."

The remedy for violations of Section 401—except as specifically provided by Section 401(c)—is described in Section 402. Under Section 402(a), a member of a labor organization, after exhausting internal remedies, or, after invoking internal remedies without obtaining a final decision within three months after their invocation, may, within one month, complain to the Secretary of Labor, alleging violation of any provisions of Section 401, including violations of the labor organization's constitution or bylaws pertaining to election of officers.

Section 402(b) directs the Secretary to investigate such complaints and, after a quasi-judicial determination by him of probable cause to believe that a violation of Title IV has occurred and not been remedied, to bring a civil action within 60 days of the filing of com-

plaint, against the labor organization in the district court of the United States, in which it maintains its principal office.[1] Section 402(b) directs that such a suit request the district court to set aside the invalid election, if any, and to direct the conduct of a rerun election in accordance with Title IV and such rules and regulations as the Secretary may provide. Finally, Section 402(b) empowers the district court to take such action as it deems proper to preserve the assets of the labor organization.

Section 402(c) directs that if the district court, after trial, finds that the violation of Section 401 "may have affected the outcome of an election", it shall "declare the election . . . to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization."

Section 403 provides as follows:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive."

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[1] It is notable that under § 601(a) of LMRDA, 29 U.S.C. 521(a), the Secretary is empowered to make an investigation whenever "he believes it necessary to determine whether any person has violated or is about to violate any provision of this Act . . ." Presumably, this confers a power to investigate violations of § 401 prior to the holding of an election. See, *Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 482 n. 5.

Rule 24(a), FRCP, provides as follows:

> "*Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT

On December 9, 1969, an election of International Officers was held among the 195,000 members of the United Mine Workers of America. The election was the climax of a bitter contest for the Union's presidency between Joseph A "Jock" Yablonski and W. A. Boyle, the incumbent president. The pre-election period was marred by countless violations of the Union's constitution and federal law.[2] During the pre-election period,

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[2] Yablonski, through his attorney, periodically filed extensive letters with the Department of Labor detailing these violations, and requesting government intervention. Each time the Secretary declined to initiate any investigation prior to the election, nevertheless conceding his power to make such investigations under Section 601(a) of LMRDA, 29 U.S.C. 521(a). The correspondence is set forth in the record of the Labor Subcommittee's hearings, Hearings, Subcommittee on Labor, UMW Election—1970, pp. 38-106.

With only his own resources to seek protection of rights guaranteed him and other UMWA members, Mr. Yablonski pursued the several suits noted in the text. In view of the Secretary's refusal to initiate any investigation during the pre-election period, it is not surprising that the evidence developed in Yablonski's pre-election suits forms the backbone of the Secretary's complaint in the present proceeding.

Mr. Yablonski was forced to initiate five suits in the District Court for the District of Columbia to secure rights guaranteed him and other UMWA members under LMRDA. The first, *Yablonski* v. *UMWA* (C.A. 1662-69), sought and obtained an order compelling the union to mail Yablonski campaign literature to members. The second, *Yablonski* v. *UMWA* (C.A. 1799-69), sought and obtained an order requiring reinstatement of Mr. Yablonski to the position of Acting Director of Labor's Non-Partisan League, the lobbying arm of the UMWA, from which he had been fired a week after declaring his candidacy; the District Court found that Yablonski's firing was a political reprisal and ordered his reinstatement. The third, *Yablonski* v. *UMWA* (C.A. 2413-69), sought and obtained an order restraining the union from continuing to use its official organ, the UMWA *Journal,* as a campaign instrument for its incumbent officers. The fourth, *Yablonski* v. *UMWA* (C.A. 3061-69), sought to establish rules and safeguards for a fair election in connection with the December 9 balloting; the District Court denied preliminary injunctive relief on the basis of representations of counsel for the UMWA that certain of the election procedures sought by the Yablonski forces would be effected.[3]

The election was held as scheduled, and the incumbents declared themselves re-elected by a vote of 80,577

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[3] The fifth suit, *Yablonski* v. *UMWA* (C.A. 3436-69), still awaiting trial, seeks an accounting and restitution from the UMWA's officers for funds misappropriated and misused, including funds used to insure the reelection of UMWA's officers during the 1969 campaign. (Notable in connection with this suit is the statement of Senator Harrison A. Williams, Chairman of the Subcommittee on Labor, which has investigated the 1969 UMW election; "Our investigation uncovered evidence of a pattern and practice of campaign financing which suggests that the quarter-million dollar campaign was financed directly and through indirect channels out of the UMWA Treasury in violation of the criminal provisions of the LMRDA." Hearings, Subcommittee on Labor, United Mine Workers—1971, July 12, 1971.)

to 46,073.[3a] On December 18, 1969, Yablonski filed election challenges with the UMWA's International Executive Board, and served copies on the Labor Department. The bodies of Mr. Yablonski and his wife and his daughter were discovered in their home in Clarksville, Pennsylvania, on January 5, 1970.

On January 20, 1970, Mike Trbovich, campaign manager for Yablonski, filed a formal complaint with the Labor Department, incorporating Mr. Yablonski's challenge of December 18, 1969, and requesting that the election be set aside.[4]

On March 5, 1970, the Secretary filed this proceeding, based on petitioner's complaint in the District Court for the District of Columbia. The first cause of action, brought pursuant to Section 402(b) of LMRDA, sought to have the election set aside on grounds of alleged violations of the UMWA constitution and LMRDA. As alleged by the Secretary, the union and the incumbent officers violated Section 401 of LMRDA by (1) failing to provide secret balloting in that many members were required or permitted to vote in such a manner that their choices could be identified, Section 401 (a); (2) failing to provide adequate safeguards to insure a fair election, including permitting campaigning at the polls, Section 401(c); (3) denying candidates the right to have observers at polling places and present where ballots were counted, Section 401(c); (4) violat-

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[3a] Notably, where Mr. Yablonski was able to place observers at the polls, he "generally defeated Boyle or broke even with him"; where Yablonski couldn't place poll watchers, Boyle "announced victories of almost 50 to 1 proportions." Hearings, Subcommittee on Labor, UMW Election—1970, p. 78.

[4] Petitioner's complaint was filed consistent with the statutory requirement of exhaustion of internal union remedies, Section 402(a) of the Act, the Union having waived exhaustion of these remedies after the murder of Yablonski, at the insistence of the Labor Department.

ing its own constitution in that many locals failed to elect tellers and to hold membership meetings to set the time and place for elections, Section 401(e); (5) denying its members the right to vote for candidates of their choice without being subject to penalty or reprisal, Section 401(e); (6) denying certain members the right to vote by failing to conduct elections in some locals, Section 401(e); and (7) using union funds, the union's official publication and other offices and properties, to promote the candidacies of incumbent officers, Section 401(g).

The second cause of action, under Section 210 of LMRDA, 29 U.S.C. 440, sought to require the union to maintain adequate financial books and records. (A preliminary injunction has been entered under the second cause of action, *infra*, p. 17.)

All of these allegations were brought to the Department's attention by the communications of the Yablonski forces before and after the election. The information provided by these communications, the evidence presented in the pre-election suits and the findings and judgments in these cases noted above, form the backbone of the Secretary's suit. The Secretary's complaint, however, failed to present in the first cause of action two crucial issues, also raised by the Yablonski forces, relating to manipulation by the union and its incumbent officers of the votes of non-working members receiving pensions from the U.M.W.A. Welfare and Retirement Fund. Because the UMW insists that retired members maintain union membership as a condition of pension eligibility, there is a substantial block of captive pensioned members.[5] In fact, the

[5] Based on an unfair labor practice charge filed by petitioner, the National Labor Relations Board has filed a complaint seeking to require the UMWA to cease and desist from the practice of in-

approximately 70,000 bituminous pensioners comprise over one-third of the UMW membership. The impact of these votes on the outcome was underscored by findings of the staff of the Senate Subcommittee on Labor in its investigation of the election. While it would not be possible to segregate votes of all of the bituminous pensioners—since most belonged to locals with at least some working members—the Subcommittee staff did analyze the votes of the 292 locals in the bituminous areas of the U.S., composed solely of pensioners. Of the 8,169 votes cast by these locals, over 93% were for Boyle. As the Subcommittee staff reasoned, if this figure is projected to all of the 70,000 potential bituminous pensioner votes, the impact on the election—with a margin of less than 35,000 votes—would appear obvious. Hearings, Subcommittee on Labor, UMW Election—1970, p. 291.

The overwhelming vote of the bituminous pensioners in favor of the Boyle slate is attributable largely to two factors: (1) a substantial increase in pension payments, and (2) perpetuation of local unions comprised solely, or almost solely, of non-working members, in violation of the UMWA constitution.

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sisting that retired members maintain membership in good standing as a condition of pension eligibility. This matter is now pending before the Board.

The findings of the District Court in *Blankenship* v. *Boyle*, 77 LRRM 2140, 2153 (D. D.C. 1971), a derivative class action involving mismanagement of the pension fund, on this point, are notable. The District Court found that the "trustees sponsored [a pension] application form which incorrectly implies that Union membership . . . is necessary before an application will be processed. . . . There is ample documentary and testimonial evidence that applicants were improperly led by this form to believe that Union membership was a prerequisite for eligibility, and were often forced to make substantial payments, sometimes running into hundreds of dollars, as 'back dues' to reinstate their Union membership."

The pension increase: On June 23, 1969, Boyle was designated union trustee of the bituminous pension fund, succeeding John L. Lewis who died earlier in the month.[6] The very next day—in the midst of the election campaign—pension payments were increased from $115 to $150 per month. The cost of the increase is about $30 million annually. Findings of the District Court in *Blankenship* v. *Boyle*, 77 LRRM 2140, 2156-57, and testimony before the Senate Subcommittee on Labor, Hearings, Senate Labor Subcommittee, United Mine Workers Election-1970, indicate that the June 24 pension increase was a politically motivated action, hastily secured by Boyle himself, without proper consultation with the other trustees of the Fund, and without consideration of its effects on the Fund's solvency.[7]

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[6] The other two trustees of the Fund at that time were George L. Judy, who had been designated operators' trustee on June 4, 1969, and Miss Josephine Roche, who had been neutral trustee for many years.

[7] *Blankenship* is a derivative class action, brought on behalf of persons entitled to benefits from the UMWA Welfare and Retirement (Bituminous) Fund, against the Fund, certain present and former trustees, the UMWA, and the National Bank of Washington (74% of whose stock is owned by the UMWA.) The suit alleged that the defendant trustees had breached fiduciary duties to Fund beneficiaries by, among other things, maintaining large balances—ranging from $30 to $75 million—in non-interest bearing checking accounts in the defendant Bank, and that the other defendants had conspired in the trustees' breach. The District Court determined on April 28, 1971 that the alleged breaches and conspiracy had occurred, enjoined continuation of such practices, and directed the ouster of Boyle and Miss Roche as trustees. Computation of damages is pending hearing in the District Court.

Relevant here is the conclusion of the District Court in *Blankenship* that in securing the June 24 pension increase, Boyle breached his fiduciary duty to Fund beneficiaries. The District Court found that Miss Roche, who was hospitalized at the time the increase was secured, and later voiced sharp criticism of it, "was not consulted

The political motivation for the increase is underscored by the form of the "Notice to Trust Fund Pensioners" of June 27, 1969, announcing the action. While notices of previous increases were simply signed "U.M.W.A. Welfare and Retirement Fund", the notice of this increase was signed "W. A. Boyle—Chairman, Board of Trustees." Samples of several increase notices are reproduced in the Labor Subcommittee hearings, Hearings, Subcommittee on Labor, UMW Election—1970, pp. 191-192.

An actuarial study of the Fund, made by the U.S. General Accounting Office at the request of the Labor Subcommittee, indicates that the increase was fiscally suicidal. The study recites:

> "Based on projections prepared for this study, the United Mine Workers Welfare and Retirement Fund will become insolvent during the fiscal year ended June 30, 1975, if pensions continue at the rate of $150 per month and no increase is made in contribution rates to the Fund."

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or even advised of the action in advance", and that the operators' trustee, Judy, agreed to vote for the increase, partly because Boyle "falsely led [him] to believe" that he had Rochie's proxy for the increase in his pocket. Further the District Court found that the increase was implemented without "detailed projections of the Fund's long-term ability to pay"; that the "increase was handled . . . with little recognition of its fiscal and fiduciary aspects"; and that the timing and hasty implementation of the increase were motivated by "election considerations." 77 LRRM at 2156-57.

Likewise relevant are the findings and conclusions of Senator Williams, Chairman of the Labor Subcommittee, made after lengthy testimony regarding the pension increase. Senator Williams found that the increase served "obvious political purposes" and was "one of the most decisive factors in the UMWA election." He concluded that the increase "represented a substantial and improper interference with the electoral process within the meaning of the statute (Sec. 401(e))." (Joint Appendix, lodged in Court of Appeals, p. 49.)

Further, the study indicates that if pensions had been maintained at $115 per month, Fund assets would not have begun to decline until the mid 1970's. (Hearings, Senate Labor Subcommittee, UMW Welfare and Retirement Fund—1970, p. 217.)

In testimony before the Labor Subcommittee, former Secretary of Labor Shultz took the position that, regardless of the fiscal unsoundness of the increase, the impropriety of Boyle's conduct, the political motivation of the increase, or its effect on the outcome of the election, the pension increase would not be "improper interference" in the sense of § 401. Hearings, Senate Labor Subcommittee, UMW Election—1970, pp. 344-45. (Compare, *NLRB* v. *Exchange Parts,* 375 U.S. 405, construing parallel language in the National Labor Relations Act, 29 USC 158(a).) Thus, the Secretary's complaint failed to raise the pension increase issue or to seek remedial relief which would dissipate the political effect of the June 24 pension increase in the context of a rerun election.

Improperly constituted locals: The UMW constitution requires that local unions with less than 10 working members be abolished, and their members transferred to properly constituted locals. Nevertheless, the UMW allowed approximately 500 of its 1200 locals to remain in existence at the time of the 1969 election and thereafter despite the fact that they were not properly constituted. The perpetuation of the "bogus" locals and the voting of pensioners through such locals carry grave potential for electoral abuse, which the Secretary of Labor has failed to recognize. First, under Labor Department ruling, local unions with *no* working members—and more than half of the "bogus" locals have *no* working members—are excluded from

the LMRDA definition of "labor organization", sec. 3(i) of the Act, 29 USC 402(i), and hence, are exempt from the reporting and disclosure requirements of Title II. In this connection, it must be recognized that 19 of the 23 UMWA districts are under trusteeship, so that their officials are appointed by the International union rather than elected,[8] and that most of the "bogus" locals which are exempt from the requirement of Title II are in Districts which are under International trusteeship. Appointed district officials control these exempt locals, and have untrammeled opportunities to expend their funds without accounting for them. Further by allowing the 500 "bogus" locals to remain in existence, the incumbents have added immeasurably to the burden of any opposition slate. In order to police conduct of any International election, an opposition party must, by virtue of these illegal locals, strain in vain to locate the sites of the polling places of these locals, must double their observer and poll worker forces, and must face insurmountable problems of communicating with more than one-third of the UMWA's membership. Worst of all, pensioners are often threatened with reprisals—particularly loss of pensions—in connection with voting, and in many instances denied their right to vote at all. In the context of the bogus locals—insulated from effective poll

[8] The Department of Labor brought a suit in December 1964 under Title III of LMRDA, Sections 301 *et seq.*, 29 U.S.C. 461 *et seq.*, to restore autonomy in seven of the districts under trusteeship. Under Section 304(c), 29 U.S.C. 464(c), trusteeships are presumed invalid after having been in existence for 18 months. Some of these trusteeships date back several decades, and the presumption of invalidity clearly applies to all of them. Almost inexplicably, the Department of Labor has acquiesced in an interminable series of requests by the UMWA for delays in bringing the suit to trial. The suit finally came to trial July 15, 1971.

watching and without the presence of any significant number of working members—the amenability of pensioners to undue influence by the UMWA and agents of its incumbent officers is at a maximum. These pensioners were easy prey for the Boyle men that "ran" the elections in the bogus locals. If these locals are allowed to be maintained during the course of a rerun election, the same abuses are certain to be repeated. To condemn the abuses without seeking remedial relief that gets at their causes is simply to encourage protracted litigation on this point and to make any rerun a mockery. Nevertheless, the Secretary's complaint fails to raise this issue, just as it failed to raise the politically-motivated pension increase.

The Secretary's complaint was also noticeably weak with respect to the second cause of action. The affidavits filed by the Department of Labor investigators demonstrate that for the three-year period, 1967-1969, expenditures of more than $10 million in funds of the International Union had not been accounted for.[9] Despite such massive irregularities, the Secretary sought only to require the International Union to maintain adequate books and records in the future. The Secretary did not seek establishment of a monitorship to assure preservation of union assets in the course of a rerun election.

The inadequacy of the relief sought by the Secretary under the second cause of action is particularly apparent, in view of the breadth of the findings of fact entered by the District Court incident to the granting

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[9] In addition, these affidavits indicate that during the same period more than $1,800,000 of expenditures by UMWA Districts were not documented. Nevertheless, the Secretary's complaint sought no relief whatsoever as to the Districts.

of the limited preliminary injunctive relief sought by the Secretary. (*Hodgson* v. *United Mine Workers of America,* 77 LRRM 2332 (D. D.C. 1971). While the Secretary sought—and the District Court consequently granted—only injunctive relief for the future, the District Court found that during the years 1967, 1968, and 1969, the UMW failed to keep and maintain adequate records regarding expense account disbursements, disbursements for organizing, mine safety work, lobbying, etc., and transferred substantial amounts of money in the form of loans or advances to various of its districts without keeping records of amounts advanced, or amounts repaid, if any.

On April 1, 1970, a group of coal miners organized the Miners for Democracy, a reform party within the UMW, aiming to assure democratic elections at all levels of the union, and to restore sound management of the union's assets. Petitioner was elected National Chairman of the group.

On October 2, 1970—when the Department's suit and motion for a preliminary injunction had made no visible progress more than six months after suit was initiated—petitioner moved, on behalf of himself and Miners for Democracy under Rule 24(a), for leave to intervene as of right or, in the alternative, for permission to intervene under Rule 24(b). Petitioner proposed additional allegations relating to the political manipulation of the pension fund, perpetuation of the "bogus" locals, and the union's failure to provide and make available to its members adequate information about, and records of, its finances, as required by Section 201 of LMRDA. Further, petitioner proposed to add four specific claims for relief requiring (1) disbanding of the bogus locals; (2) installation of a Board

of Monitors to oversee UMWA financial affairs; (3) publication of a finding that the incumbent president breached his fiduciary duty to all members by manipulating the Fund for political benefit, so as to dissipate the effect of the pension increase on the pensioned voters: and (4) establishment of rules for conduct of a rerun election, or appointment of a panel, to be paid out of UMW funds, to establish and enforce fair rules for a rerun election.

The District Court did not in any way deny that petitioner satisfied the conditions for intervention of right. Rather it made the inference—a patent *non sequitur,* as we shall show—that since Congress accorded the Secretary sole authority to *initiate* suit, it also meant to preclude intervention. For the same reason the District Court denied permissive intervention.

The Court of Appeals affirmed summarily. Its judgment cited "substantial agreement" with the District Court's opinion.[10]

It is significant that the Secretary conceded in oral argument in the Court of Appeals that petitioner fully satisfies the conditions for intervention of right under Rule 24(a). Given this concession, it is unnecessary to labor the point that petitioner has substantial interests which will be practically affected by this proceeding and which are not adequately represented by the Secre-

[10] The brevity of the Court of Appeals' opinion should not be taken as reflecting a view that the question posed is insubstantial. Rather, the Court of Appeals was working under extreme time pressure, since at that time this case was scheduled to come to trial in May 1971. Thus oral argument was had April 22—only days after submission of the Secretary's brief and petitioner's reply brief—and the Court of Appeals announced its decision on April 27.

tary. Suffice it to say that petitioner and those he represents have strong interests in assuring that all violations of Section 401—those alleged by the Secretary as well as those touching manipulation of the pensioner votes—be presented forcefully and effectively. Assuming that there is to be a rerun election, petitioner and the persons he represents have urgent interests in securing relief particularly, establishment of guidelines that will genuinely assure a fair, honest election, and preservation of union assets in the meantime.[11]

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[11]After repeated delays, trial of the Secretary's suit is now scheduled to begin September 13, 1971. Even if the suit actually does come to trial before disposition of this petition, petitioner's interest in having a voice in the formulation of guidelines for a rerun election will hardly be mooted, or rendered less urgent. Further, a pattern of illegality is apparent in connection with UMW elections. Serious questions have arisen in connection with the December 1970 election of officers in UMW District 5, one of the four UMW districts not under trusteeship. That election is now under investigation by the Department of Labor. Recent testimony before the Senate Labor Subcommittee regarding the District 5 election detailed violations of LMRDA, including misappropriation of District 5 funds to support the campaigns of the incumbents, violation of members' rights to vote without interference, and a failure to count ballots from three large locals within the District which went overwhelmingly against the incumbents. Hearings, Subcommittee on Labor, UMW Election, July 12-13, 1971. The December 1970 District 5 election was a repeat performance of the 1969 International election. Further, present use of the UMW *Journal* by the incumbent International officers to propagandize for their future campaigns is already casting doubt on whether a fair election can be held in the future, whether under the Secretary's supervision or not.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The Holding That Title IV of LMRDA Impliedly Bars Intervention by a Union Member, Who Concededly Meets the Standards of Rule 24(a), in a Suit by the Secretary of Labor To Overturn a Union Election Presents a Substantial Question Not Heretofore Decided by This Court.

The Court of Appeals held that intervention in the Secretary's suit is precluded by Section 403 of the Act, 29 U.S.C. 483, which states:

> "The remedy provided by this title for challenging an election already conducted shall be exclusive."

The Court of Appeals decided the question summarily and in a manner inconsistent with this Court's decisions in *International Union, UAW* v. *Scofield,* 382 U.S. 205, and *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Corp.,* 386 U.S. 129, and with Rule 24, FRCP.

The only other court of appeals decision on this question is *Stein* v. *Wirtz,* 366 F.2d 188 (C.A. 10), *cert. denied,* 386 U.S. 996. The Tenth Circuit also held intervention precluded by Section 403. It is notable that the petition for certiorari in *Stein,* no. 1257, OT 1966, was submitted *pro se* and was untimely filed under statutory limits on this Court's jurisdiction, 28 U.S.C. 2101(c). It is also notable that *Stein* arose prior to the 1966 amendments liberalizing Rule 24(a), and also that the *pro se* petition failed to adduce the bearing of *Scofield* on the question presented. Further, it is notable that the sole reason given by the Secretary in his opposition to the petition in *Stein* was its untimeliness. Thus, it is evident that the substantiality of the question presented here has not been effectively argued by way of any prior petition for this Court's review.

2. Intervention Is Not Precluded by Section 403 of the Act

Given the Secretary's concession that petitioner fully satisfies all conditions for intervention of right under Rule 24(a), and given the liberal purpose of the 1966 revision of the rule, the Secretary has a heavy burden of demonstrating either clear language in LMRDA or clear indication in the legislative history in support of his position that LMRDA precludes intervention. We maintain that he has done neither.

By providing that the remedy described in Section 402 of the Act, 29 U.S.C. 482, is "exclusive", Section 403 makes clear that the Secretary has the sole authority to *initiate* suits to upset union elections. Section 403 does not specifically provide that the Secretary shall be the sole party-plaintiff, or that other persons interested in the proceeding may not intervene.

Generally, intervention in proceedings in federal district courts is governed by Rule 24, FRCP. Under Rule 24(a)(2), a person is entitled to intervene as a matter of right when he "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

We submit that there is nothing in the language or in the legislative history of the LMRDA calling for an exception to Rule 24's application.

The lower courts' decision to the contrary rests on a reading of Section 403 of the Act which confuses the right to *initiate* suit with the right to *intervene* in litigation already under way. The rights to initiate

suit and to intervene are distinct and are not co-extensive. The fundamentality of the distinction between them has been stressed by Professor David Shapiro.

> "Perhaps it should go without saying, but it must be understood that there is a difference between the question whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene. Thus, to decide whether a particular action may be brought by this plaintiff against this defendant may require a determination of whether the controversy is ripe for adjudication, whether the parties before the court are real parties in interest, and whether the interests asserted are sufficient to mobilize the judicial machinery. When one seeks to intervene in an ongoing lawsuit, these basic questions have presumably been resolved; the disposition of the request, then, should focus on whether the prospective intervener has a 'sufficient stake in the outcome to contribute to the resolution of the controversy to justify his inclusion." Shapiro, *Some Thoughts on Intervention before Courts, Agencies and Arbitrators,* 81 Harv. L. Rev. 721, 726 (1967).

Professor Shapiro's comments regarding Title IV of LMRDA highlight the Court of Appeals' confusion of initiation and intervention in this case.

> "Under Title IV of the Landrum-Griffin Act, only the Secretary of Labor can initiate an action to set aside a union election, but it need not follow that the complainant who starts the machinery of the Secretary in motion may never intervene to protect his interest once a case is filed. That determination may well turn on a number of factors quite separate from his standing to sue, including the nature of his interest and the adequacy of the protection afforded that interest by existing parties." (Id., at 727.)

Nor does the legislative history support the Court of Appeals' reading of the Act.

The legislative history reveals that Congress' intent in enacting Sections 402 and 403 was to provide the strongest possible judicial enforcement of rights protected by Section 401, at the same time avoiding piecemeal litigation and excessive disruption of union affairs. Piecemeal litigation is avoided under this scheme by the direction in Section 403 that the remedy provided in Section 402 shall be exclusive. Excessive disruption of union affairs is avoided by the requirements of Section 402 preconditioning initiation of suit on (1) pursuit by the complaining union member of internal union remedies, and (2) the Secretary's determination of probable cause to believe that violations of Section 401 occurred, and may have affected the outcome of the election.

When viewed in light of these objectives, it is apparent that Congress' choice of a scheme of judicial enforcement vesting initiation of suits in the Secretary suggests no intent to preclude intervention.

Sections 402 and 403, as ultimately enacted in 1959, had their origin in a bill introduced by Senator Kennedy in 1958 (S. 3751, introduced May 5, 1958); *Department of Labor Legislative History of the Labor-Management Reporting and Disclosure Act,* p. 700. This was incorporated in S. 3974 which was passed by the Senate in 1958. *Legislative History, supra,* p. 760. The wording of the sections, as introduced by Senator Kennedy and passed by the Senate in 1958, was, in all relevant respects, identical with the sections as finally enacted in 1959.

When the report of the Senate Committee on Labor and Public Welfare on S. 3974, S. Rep. No. 1684, 85th Cong., 2d Sess. 1958, was submitted, Senator Kennedy explained why authority to bring suit was vested in the Secretary. His explanation stressed that suits by the Secretary would provide stronger enforcement of members' rights to fair and honest elections than suits by members, since the latter frequently would lack adequate resources to bear the burden of litigation by themselves. He spoke in these terms:

> "In the bill we provide the right to appeal to the Secretary of Labor whenever a member believes that his rights, as provided in the case of an election have been denied him. . Then the Secretary of Labor in effect becomes the union member's lawyer. Such a provision is infinitely stronger than any provision now in effect." 104 Cong. Rec. 10947, June 12, 1958.

Senator Kennedy affirmed that the authority to sue was given to the Secretary, "in order that the Secretary of Labor can look after a *member's interests.*" (Emphasis supplied). Later the same day, Senator Kennedy underscored the role of the Secretary as aiding union members in enforcing their rights:

> "*The bill adds to and does not detract from the members' rights.* In addition, under the bill they will have the right to invoke the aid of the Secretary of Labor and the Federal Courts to relieve their loads of oppressive trusteeships maintained by national and international unions for improper and undemocratic purposes. They will also have the right to invoke the aid of the Secretary in assuring that their constitutional officers are elected democratically by secret ballot, that members are not improperly denied the right to vote, and that

> elections are properly conducted." 104 Cong. Rec. 10999, June 12, 1958. (Emphasis supplied).

The original understanding of Section 402 was quite clear. Senator Kennedy, on the floor of the Senate, made as explicit as words possibly can that the rights being protected were the union members' rights, and that the role of the Secretary was to aid them in enforcing those rights because in election disputes the costs of litigation were too heavy for union members to bear.

These explanations of Senator Kennedy settled the issue in the Senate. The next year the provision was reincorporated in S. 1555, the new bill reported out by the committee, S. Rep. No. 187, 86th Cong., 1st Sess. 1959, and passed by the Senate without any comment.

Two major alternatives to this scheme were before the Congress. First, the bill adopted by the House of Representatives would have authorized union members—rather than the Secretary—to initiate suit, after exhausting internal union remedies, to set aside union elections.[12] Second, a bill before the Senate, supported by Senator Goldwater and the administration, S. 748, 86th Cong., 1st Sess. (1959), authorized the Secretary to initiate election challenge suits, but also provided that union members, without exhausting internal remedies, could bring suit in any court of competent jurisdiction, raising claims not raised by the Secretary.

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[12] The bill reported out by the House Committee on Education and Labor, H.R. 8342, provided for suit by members, rather than by the Secretary. No explanation for this was given in the Committee report, H. Rep. No. 741, 86th Cong. 1st Sess. 1959, nor in House floor debates. Provision for initiation of suit by union members was copied without comment in the Landrum-Griffin substitute bill, H.R. 8400, which passed the House.

No intent to preclude intervention can be inferred from the fact that the Senate chose the Kennedy bill, and not the Goldwater-Administration bill, if for no other reason than that the Senate never even voted on this alternative. By allowing union members to initiate suit in any court of competent jurisdiction, whether state or federal, the Goldwater bill would have spawned piecemeal litigation, which the language of Section 403 of the Act shows Congress was seeking to avoid. Further, by allowing union members to initiate suit without exhausting internal remedies, and without any determination by the Secretary that the election had probably been affected by violations of the Act, the Goldwater bill would have caused substantial disruption of union affairs; the language of Section 402(a) and (b) makes unmistakably clear that Congress sought to limit such disruption. At any rate, the Goldwater bill had no relevance to the question of intervention; hence, non-adoption of the Goldwater bill may not logically be taken as evincing any intent to preclude intervention. On the contrary, the Goldwater bill's provision for initiation of suits by members, separate from the Secretary's suit, may have been thought unnecessary in view of the presumed availability of intervention under Rule 24, FRCP. (See note 13, *infra,* p. 27)

Similarly, no intent to preclude intervention may be found in the Conference Committee's choice of the Kennedy bill—authorizing the Secretary to initiate suits—over the House bill, which authorized initiation of suits solely by members. First, the Conference Committee's report offers no explanation for this choice, H. Rep. No. 1147, 86th Cong. 1st Sess. 1959. To the extent that reasons can be inferred, it appears

that the Conference Committee's preference for the Senate version stemmed from the same considerations enunciated by Senator Kennedy. Some light on the Conference Committee's decision is shed by statements of Senator Goldwater, a member of the Committee, to the Senate, while the work of the Conference Committee was under way:

> "... the approach of the Senate bill is substantially preferable in its reliance on Government, rather than *exclusively* individual, enforcement action. Since the election standards are designed to insure honest elections for the benefit of all union members as a matter of public policy, their violation is a matter of public rather than *exclusively* individual concern and should be enforceable in the same way as the trusteeship standards in the bill . . ." [13] (Cong. Rec. 16489, Senate, August 20, 1959, *Legislative History, supra,* 830.) (Emphasis supplied.)

Rejection of the House bill, then, signifies that Congress decided that as a matter of public policy, *exclusive* reliance on union members for initiation and conduct of litigation challenging union elections would not adequately enforce rights protected by Section 401. Rather than downgrading the interests of individual members in assuring fair and honest elec-

[13] It is notable that trusteeships can be voided by action of either the Secretary or the individual union members under Section 304 of the Act, 29 U.S.C. 464. Thus, at least in Senator Goldwater's view, the Conference Committee's rejection of the House's reliance on "exclusively individual enforcement action" left individuals with an enforcement role analogous to that under the trusteeship provisions. Since the Senate had granted sole authority to *initiate* suit to the Secretary, thereby passing over the Goldwater-Administration bill, Senator Goldwater evidently contemplated that individuals could, under the Senate bill, perform this enforcement role by way of intervention.

tions, this determination accorded greater recognition to those interests by lending the prestige and resources of the Secretary to their enforcement. Surely the legislative desire to avoid piecemeal litigation—as expressed in Section 403, vesting sole authority to *initiate* suit in the Secretary—serves to assure effective and efficient enforcement of Title IV and is consistent with the policy underlying the Conference Committee's decision. Also the legislative aim of avoiding undue disruption of internal union affairs, served by preconditioning suit on pursuit of internal remedies and determination of probable cause, is consistent with the policy of enhancing enforcement of rights protected by Title IV. In contrast, a legislative intent to preclude intervention, and thereby deny individual members any access whatsoever to the judicial machinery for challenging elections, would be totally inconsistent with the clear indications that it was *their* rights which Congress was seeking to protect by enacting Title IV, and, specifically, by involving the Secretary in the enforcement process.

In sum, the only clear legislative history with respect to union members' participation in Title IV suits brought by the Secretary is to be gleaned from the 1958 debate and not from the various proposals which were rejected in 1959 in favor of the exact provisions which passed the Senate in 1958. The suggestion that the right of intervention, which otherwise would have been available to an interested union member under Rule 24, would be denied to him under Section 402, is simply at odds with Senator Kennedy's explicit announcement that the identical provisions in the 1958 bill "adds to and does not detract from the members' rights."

Even if the legislative history could somehow be deemed to leave room for doubt, surely doubts should be resolved in favor of the individual members whom Congress sought to protect and not in favor of entrenched union leadership. Strong support for this view was expressed in recent testimony of Senator Robert P. Griffin before the Senate Labor Subcommittee in a hearing focusing on the Department of Labor's administration of LMRDA, and whether it has lived up to the intent of the legislating Congress. As one of the principal sponsors of LMRDA, with which his name is popularly connected, Senator Griffin speaks with authority regarding the intent of Congress in enacting this legislation. As a general matter, Senator Griffin stated,

> ". . . I am compelled to say that . . . over the past 12 years under four Administrations, the Labor Department has generally been timid and reluctant to give Landrum-Griffin the vigorous implementation and strict enforcement Congress expected."

With respect to the question posed here, Senator Griffin had the following to say,

> Even though Congress gave exclusive authority to the Secretary of Labor to *initiate* such suits, I am aware of no clear requirement that complaining parties must be excluded once legal proceedings have been initiated. Once again it seems to me, doubts have been resolved against the worker and in favor of the entrenched union hierarchy."

Hearings, Subcommittee on Labor, UMW Election—July 13, 1971. Prepared statement of Senator Griffin.

3. Intervention by Union Members Whose Interests Are Not Adequately Represented by the Secretary Is Necessary to the Protection of Their Rights Under Section 401 of the Act and To Realization of the Congressional Purpose of Assuring Fair and Honest Union Elections.

Rule 24 represents the considered judgment of the Advisory Committee on Rules as to when intervention is appropriate. The judgment necessarily represents a balancing of the interest of proposed intervenors with the interests of the original parties in controlling the course of the litigation and avoiding proliferation of parties and issues. Rule 24(a) does not accord an unqualified right of intervention to all persons in all circumstances. Only those who genuinely claim an interest in the proceeding which is not shown to be adequately represented by existing parties are entitled to intervene as a matter of right.

Further, the Notes of the Advisory Committee on Rules regarding the 1966 revision of Rule 24 indicate, "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." As has been indicated, petitioner is seeking to do two things by way of intervention: first, to raise certain issues not raised by the Department, and, second, to assure that those violations which the Secretary has alleged will be vigorously presented and their recurrence effectively prevented. Certainly the Secretary —like any other party to any other suit—may adduce legitimate interests in avoiding proliferation of parties and issues and in controlling the course of litigation. To the extent that these interests are legitimate, however, they are adequately protected by Rule 24 itself. A total ban on intervention, as advocated by the Sec-

retary, would be a disservice to the rights of union members which LMRDA commands the Secretary to protect. Given the balancing inherent in Rule 24, such an extreme position is totally unnecessary to protect any legitimate interest of the Secretary.

The appropriateness of intervention of right in this case is especially clear in view of the 1966 revision of Rule 24(a) removing restrictions which had encumbered intervention under the former Rule.[14] This Court in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129 declared that under the revised Rule 24(a), "some elasticity was injected", 386 U.S. at 134, and expanded the right of competitors and customers to intervene in government antitrust suits. In dramatic contrast, there is no "elasticity" whatsoever in the Secretary's position regarding intervention in this case. The absolute rigidity and arbitrariness of the Secretary's position are best illustrated by his own statement:

> "The short of the matter is that intervention is precluded by the LMRDA, irrespective of the degree of substantiality of the claims which the applicant for intervention presents or the wisdom of the Secretary's decision not to raise certain issues." (Brief for the Secretary of Labor in the Court of Appeals, p. 36.)

In this case there is no question that petitioner satisfies the conditions of Rule 24(a) for intervention of right. In fact, the Secretary conceded as much in

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[14] Inexplicably, the District Court cited *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 694 (1961), for the proposition that one may not intervene in the litigation of others as a matter of right unless "he shows the equivalent of being legally bound by the decree in their case." This is clearly no longer the law in view of the 1966 revision of Rule 24(a).

oral argument before the Court of Appeals, arguing that regardless of the degree to which petitioner may have substantial interests in the proceeding, and regardless of the degree to which those interests may be inadequately represented, intervention is absolutely precluded.

The desirability of intervention here is closely analogous to that recognized by this Court in *International Union, UAW* v. *Scofield*, 382 U.S. 205. The question in *Scofield* was whether parties wholly successful in NLRB unfair labor practice proceedings are entitled to intervene in court of appeals review and enforcement proceedings. In *Scofield,* as here,—and we have been able to find no other instance—it was argued that the relevant statutory scheme, Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f), evinced a legislative intent to create an exception to normal procedural rules and absolutely to preclude intervention. This Court held, applying Rule 24 by analogy, that the successful party before the Board—whether a charged party or a charging party —is entitled to intervene in court of appeals proceedings.[15] As the party whose complaint triggered the

[15] There is a striking parallel between the NLRA enforcement mechanism for remedying unfair labor practices, and the enforcement scheme under Title IV of LMRDA. In each case, a charging party makes a complaint, in one case with the Regional Director of the National Labor Relations Board, and, in the other, with the Secretary of Labor. If the charging party is successful, in each case a quasi-judicial determination is made; in one case, that unfair labor practices have occurred, and, in the other, that violations of LMRDA have occurred which may have affected the election outcome. In each case, the extra-judicial determination is not self-enforcing. The major distinction is that the NLRB seeks enforcement of its orders in the courts of appeals, whereas the Secretary of Labor is directed to the district courts.

Secretary's Section 402(b) investigative and enforcement machinery, petitioner is in a posture similar to that of a successful charging party before the NLRB. Most, if not all, of the considerations underlying this Court's decision in *Scofield* also obtain here.

First, this Court was concerned with avoiding duplication of judicial proceedings; this Court stressed that if the initial Board decision were reversed by the court of appeals, and the Board then entered an order adverse to the initially successful party, that party would then be able to seek court of appeals review, raising issues already presented to the court of appeals. Here, petitioner has causes of action independent of this proceeding by which he can try to vindicate his interest under the UMW constitution in assuring abolition of the improperly constituted locals and publication of an order dissipating the effect of the incumbent president's political manipulation of the pension fund. Here as in *Scofield,* the policy of avoiding piecemeal judicial proceedings supports intervention.

Second, this Court expressed concern in *Scofield* that denial of intervention in court of appeals proceedings would result in unfairness to the initially successful party in that the *stare decisis* effect of the court of appeals decision could adversely affect his interest in subsequent Board and court of appeals proceedings arising from the same complaint, and in collateral proceedings. Similarly, petitioner's interest in assuring effective guidelines for a rerun election and his interest in collateral proceedings will undoubtedly be affected by decision in this proceeding.[16]

[16] For example, it is alleged in *Yablonski* v. *UMW* (C.A. 3436-69), in which petitioner is a plaintiff, that the incumbent officers utilized union funds to promote their reelection campaigns in vio-

Third, this Court in *Scofield* expressed concern that the Board might not adequately represent the interest of the successful party before the appellate court, either by failing vigorously to press the doctrine underlying its own decision or by failing to apply for certiorari in the event of reversal by the court of appeals. Here it is evident that the allegations and request for remedy stated in the Secretary's complaint are inadequate to represent petitioner's interest in assuring a democratic election.

Fourth, this Court in *Scofield* emphatically rejected the Board's argument that the successful charging party is "but another member of the public whose interests the Board is designed to serve" and that the Board "is the custodian of the 'public interest' to the exclusion of the so-called 'private interests' at stake." (382 U.S. at 204.) This Court stressed that utilization of the "rhetoric of 'public interest' . . . is not to imply that the public right excludes recognition of parochial private interests." *Ibid.* Nevertheless, the Secretary persists in arguing that the interests claimed by petitioner are not part of the "public interest" which LMRDA seeks to protect. This is not only inconsistent with *Scofield,* but with clear indications in the legislative history that the rights to be protected by the Secretary's Section 402(b) suits were those of union members, *supra,* pp. 24-25.

Fifth, the Court reasoned that denying participation to the successful party but allowing it to the

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lation of their fiduciary duties to the union under Section 501(a) of LMRDA. Clearly, petitioner's interest in that suit will be practically affected by the resolution of the Secretary's allegation that union funds were used in the incumbents' campaign in violation of Section 401(g) of LMRDA.

unsuccessful party would prejudice the former for his success before the Board. This Court indicated that it would have to attribute capriciousness to Congress in order to conclude that only unsuccessful parties could participate in court of appeals review proceedings. Yet the same capricious distinction has been drawn here. There is no question but that a union officer may intervene as a defendant in a Section 402(b) suit against a union to set aside that officer's election. In *Shultz* v. *United Steelworkers of America*, 312 F. Supp. 538 (W.D. Pa.), the Secretary conceded that a union district director whose election was challenged by the Secretary's suit had sufficient interest to justify intervention "because he might lose his job." Inasmuch as the Secretary had found probable cause to believe that the district director's election was tainted by violations of Section 401, the intervening district director was clearly the "unsuccessful party" with respect to the Secretary's quasi-judicial determination. The Secretary—one might say "capriciously", given this Court's comments in *Scofield*—persists in the position that intervention by the unsuccessful charged party is consistent with LMRDA, but that intervention by the successful charging party is precluded.[17]

Further, intervention serves a useful purpose in assuring effective enforcement of LMRDA because the

[17] As a practical matter, union incumbents, who have been "unsuccessful" with respect to the Secretary's quasi-judicial determination of probable cause, are adequately represented in district court proceedings challenging their elections, whether they intervene or not. This is because the incumbent officers shape union policy and hire union lawyers who will represent not only the union, but also the parochial interests of incumbent officers who want to keep their jobs.

Secretary and those designated by him to enforce Title IV have limited knowledge of the United Mine Workers' internal structure and have limited resources for investigating alleged violations. While the Secretary and his designees undoubtedly have expertise on union election processes, generally, they cannot be intimately familiar with the unique internal structure of the UMW and the subtle devices which may be used unlawfully to distort the election process. Limitations on their familiarity with these matters are aggravated by the refusal of the Secretary to exercise his unquestioned authority under Section 601(a) of LMRDA to initiate investigations prior to election. It must be noted that Section 402(b) of LMRDA allows the Secretary only 60 days for investigation of complaints submitted pursuant to Section 402(a). Given the Secretary's refusal to exercise his statutory power to investigate prior to election, the 60-day investigation period allowed by Section 402(b) cannot be sufficient fully to familiarize the Secretary with subtle abuses occurring in the context of a large, international election such as the one involved in this case. The Secretary's position regarding the "bogus" locals is a prime example of his unfamiliarity with internal UMW structure. The Secretary's failure to raise this issue seems to be based at least in part on a misconception of how these local unions arose, what purpose they serve, how they are controlled, the way in which retired miners have been assigned to them, and the method by which they have been voted in bulk for the incumbent officers. Hearings, Subcommittee on Labor, UMW Election—1970, p. 509. Petitioner has intimate knowledge of the internal operations of this particular union and he has thousands of sup-

porters in widely scattered locals who can call attention to violations and help collect evidence. Only with the reinforcement which his intervention can add, will representation of his interests be entirely adequate.

A final important reason for intervention stems from the fact that formulation of ground rules for a rerun election, and disposition of claimed violations, in practice, are the product of negotiations by the Secretary with the competing groups. Such negotiations are imbalanced when only the incumbents have legal standing to challenge solutions proposed by the Secretary. All of the pressures are on the Secretary to compromise with the incumbents, for the opposition, without intervention, has no legal leverage. The incumbents', and only the incumbents', agreement is required for a consent order or stipulation; the opposition's protests can be ignored. Just such one-sided pressure led this Court in *Cascade,* to speak of the dangers that the government would "knuckle under," (386 U.S., at 142) and to grant intervention to protect against this danger.

CONCLUSION

If one thing is clear it is that the trend of the law is toward free intervention where administrative action is concerned. All the fears and all the dangers which administrative agencies have conjured up about intervention have not been enough to persuade the courts to deny those with real interests the right to participate in defending those interests. *International Union, UAW* v. *Scofield, supra.* Indeed, there is an irony in even the suggestion that "the protected groups in an administrative program [should] pay for their protection by a sacrifice of procedural and litigating

rights. . . ." (Hart and Wechsler, *The Federal Courts and the Federal System,* 326 (1953).)

For the reasons stated, the petition should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STSTES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[no opinion]

No. 24,946

SEPTEMBER TERM, 1970

JAMES DAY HODGSON and MIKE TRBOVICH, *Appellant*,

v.

UNITED MINE WORKERS OF AMERICA

[Filed April 27, 1971]

NATHAN J. PAULSEN, Clerk

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, TAMM and ROBB, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, and this court being in substantial agreement with the memorandum opinion filed by the District Court, *Hodgson* v. *United Mine Workers of America*, 51 F.R.D. 270 (1970), it is ordered and adjudged by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES D. HODGSON, Secretary of Labor, *Plaintiff*,

v.

UNITED MINE WORKERS OF AMERICA, *Defendant*.

Civil Action No. 662-70

[Filed November 17, 1970]

JAMES F. DAVEY, Clerk

Memorandum Opinion

This is an action by the Secretary of Labor under the Labor-Management Reporting and Disclosure Act, 29 U.S.C.A. § 401 *et seq.*, to set aside the election of defendant's officers held on December 9, 1969, and to compel defendant to maintain certain financial records. Applicant Miners for Democracy is an organization formed in April, 1970, for the purpose of bringing about reform in the defendant union; applicant Trbovich is a member of defendant union and Chairman of Miners for Democracy. Applicants seek to intervene in the action pursuant to Fed. R. Civ. P. 24(a), intervention as of right, or, failing that, pursuant to Rule 24(b), permissive intervention.

I.

As for the first cause of action, it is undisputed that the *exclusive* remedy for challenging an election already conducted is a suit by the Secretary of Labor pursuant to a complaint by a union member and a determination by the Secretary of "probable cause" to believe that a violation of the law governing elections has occurred. 29 U.S.C.A. §§ 482, 483; *Calhoon* v. *Harvey*, 379 U.S. 134 (1964); *Wirtz* v. *National Maritime Union of America*, 409 F.2d 1340 (2d Cir. 1969). A union member himself has standing neither to bring such a suit nor to compel the Secretary to bring

one. 29 U.S.C. §§ 482, 483; *Wirtz* v. *N.M.U.A., supra; Katrinic* v. *Wirtz,* 62 L.R.R.M. 2557, 53 L.C. ¶ 11,289 (D. D.C. 1966).

The legislative history of the Labor-Management Reporting and Disclosure Act makes us doubt that intervention by a union member in a suit by the Secretary to set aside an election would be consistent with the congressional purpose. The House bill provided that complaining union members themselves, rather than the Secretary, would bring a civil action in the federal district court to enforce the election provisions. 105 *Cong. Rec.* 16,489 (1959) (remarks of Senator Goldwater). The Senate version contained substantially what was enacted, namely, that the Secretary would be the exclusive enforcer of the election provisions of the Act. *Cong. Rec., supra.* We think the fact that Congress considered two alternatives—suit by union members and suit by the Secretary—and then chose the latter alternative and labelled it "exclusive" deprives this Court of jurisdiction to permit the former alternative via the route of intervention. 29 U.S.C.A. § 482; Fed. R. Civ. P. 82.

Applicant cites us to *International Union, U.A.W. Local 283* v. *Scofield,* 382 U.S. 205 (1965), as authority for allowing intervention here. *Scofield* held that the successful party in an unfair labor practice proceeding before the N.L.R.B. has a right to intervene when the court of appeals reviews the Board's order. The main rationale of the decision was the desirability of avoiding multiple appeals. If the party successful before the Board is not allowed to intervene in the court of appeals and if the court of appeals reverses the Board and returns the case to it for further proceedings, then it is probable that the party who was not allowed to intervene in the first appeal will himself have the right to bring a second appeal. In the interests of judicial efficiency and fairness to the would-be intervenor, the Supreme Court considered it highly de-

sirable to have the court of appeals hear all the parties in one proceeding. *U.A.W.* v. *Scofield, supra,* at 212, 213.

The instant case, which arises under the Labor-Management Reporting and Disclosure Act (29 U.S.C.A. §§ 401 *et seq.*), is totally different from *Scofield,* which dealt with intervention under the National Labor Relations Act (29 U.S.C.A. § 151 *et seq.*). The would-be intervenor here has not already been successful before a lower tribunal, and there is no danger of a multiplicity of appeals if intervention is denied in this case. As Professor Moore says in discussing Scofield, "Where the prevention of multiple appeals is not at stake, the rule should not apply." 3B *Moore's Federal Practice* ¶ 24.06 [6.-8], at 24-132.

The only appellate court opinion squarely on point, and it is post-Scofield [1], denied intervention to a union member in an action by the Secretary to set aside an election. *Stein* v. *Wirtz,* 366 F.2d 188 (10th Cir.), *cert. denied* 386 U.S. 996 (1966). In *Stein,* the Secretary sued to set aside the election on the basis of a complaint by the applicant for intervention that the union had refused to permit him to be a candidate for the position of Business Manager. Two months after the filing of the action, the union and the Secretary stipulated that appellant would be eligible for candidacy in the following election, to be held eight months later. The Secretary and the union requested that the case be held in abeyance until after the elections when, assuming that the union complied fully with the terms of the stipulation, the Secretary would move to dismiss the action.

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[1] The *Stein* court did not discuss *Scofield.* Applicant ascribes this failure to the Tenth Circuit's ignorance of the *Scofield* opinion, and he points out that *Stein* proceeded *pro se* in the court of appeals. We think it highly unlikely that the distinguished court in *Stein* was ignorant of a major Supreme Court opinion of the preceding term. A more likely explanation for the failure to mention *Scofield* is that the court in *Stein* did not consider *Scofield* to be relevant to the problem before it.

In affirming the district court's denial of intervention, the court of appeals said:

> "Although appellant's subjective dissatisfaction with the Secretary's prosecution of this action is completely understandable, yet we are constrained to agree that the District Court was without jurisdiction to permit his intervention in a Title IV action." 366 F.2d at 139.

II.

What we have said against permitting intervention in the first cause of action applies also to the second cause, in which the Secretary seeks an injunction to compel the defendant union to maintain financial records from which the union's annual financial reports to the Secretary may be verified. 29 U.S.C.A. §§ 431, 436, 440. The Secretary is the one person authorized by the statute to seek such an injunction. 29 U.S.C.A. § 440.

Applicants undeniably have an interest in ensuring that union funds are spent for the sole benefit of the organization and its members. 29 U.S.C.A. § 501. They are already seeking to vindicate that interest in another suit in this court (Civil Action 3436-69) for an accounting, restitution and damages pursuant to 29 U.S.C.A. §§ 185, 501 (a) and (b). The issue in the applicants' pending suit is whether or not the union has misappropriated funds. In the instant suit the dispositive issue is quite different, namely, whether the union has failed to maintain records on the matters required to be reported to the Secretary (pursuant to 29 U.S.C.A. § 431) "which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness." 29 U.S.C.A. §436.

One may not intervene as a matter of right in the litigation of others unless he shows the equivalent of being le-

gally bound by the decree in their case. Fed. R. Civ. P. 24(a)(2); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 694 (1961); *Apache County* v. *United States*, 256 F. Supp. 903, 907 (D. D.C. three-judge panel 1966). Applicants have not made that showing here. As for permissive intervention, Fed. R. Civ. P. 24(b)(2), we do not perceive a sufficient nexus between applicants' interest and the Secretary's suit to justify it. At the same time, we believe applicants' own pending lawsuit to be an adequate means of asserting their rights.

The motion to intervene is denied.

William B. Bryant
Judge

Dated: March 17, 1970.